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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 397.

CHARTER SHIPPING COMPANY, LTD.,
Petitioner,

against

BOWRING, JONES & TIDY, LTD.,
Respondent.

BRIEF FOR PETITIONER.

CLETUS KEATING,
Counsel.

New York, January, 1930.

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Supreme Court of the United States

CHARTER SHIPPING COMPANY, LTD., Petitioner, *against* BOWRING, JONES & TIDY, LTD., Respondent.	OCTOBER TERM 1929. No. 397.

BRIEF FOR PETITIONER.

I. *Jurisdiction.*

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, filed pursuant to the provisions of the United States Code, Title 28, Section 347 (a), on September 14, 1929, and granted on October 21, 1929.

II. *Opinions.*

The writ seeks to review a decree of the Circuit Court of Appeals for the Second Circuit which reversed a decree dismissing the libel entered on December 7, 1928, in the United States District Court for the Southern District of New York (R. 11).

The memorandum opinion of the District Court by Judge Thacher is not reported, but appears at page 11 of the Record.

The opinion of the Circuit Court of Appeals (Manton, J.) is reported in 33 F. (2d) 280, and is to be found at pages 14-17 of the Record.

III. *Statement of Facts.*

The respondent, a British corporation, filed a libel *in personam* against petitioner, also a British corporation, to recover a general average deposit made in London.

The libel alleged that, in September, 1926, there were delivered to the petitioner at various United States Gulf ports and shipped on petitioner's vessel, the *Charterhague*, certain barrels of turpentine and rosin, for transportation to the Port of London (R. 2); that agents for the petitioner issued bills of lading, acknowledging receipt of the goods and agreeing that the barrels of turpentine and rosin would be transported on the steamship *Charterhague* to the Port of London and there delivered unto the order of shippers; that thereafter the said bills of lading were endorsed and delivered to the respondent (R. 3). The libel then alleged that before the steamship *Charterhague* arrived at the Port of London and before the respondent learned the facts of unseaworthiness, the petitioner's representative in London advised respondent that respondent's cargo would be liable on account of general average, and that a deposit of £1,334.2.9 would be required in order to release respondent's cargo (R. 3). The libel then alleged that the respondent made the deposits requested with Messrs. Francis & Arnold, English General Average Adjusters, at London, and took delivery of the cargo there (R. 3). It was then alleged that the respondent subsequently was informed that the *Charterhague* was unseaworthy at the beginning of her voyage and, therefore, respondent was under no liability on account of general average and that the amounts of the aforesaid deposits made in London are due and returnable to the respondent (R. 4).

To this libel the petitioner filed exceptions, requesting the District Court in its discretion not to take jurisdiction, on the ground that both parties to the litigation were British corporations, having their principal places of business in England; and that the general average adjustment had been prepared in England and the deposits made there (R. 5, 6).

The libel and exceptions were all that was strictly before the District Court.

Before the matter was heard, however, by Judge Thacher in the District Court, Theodore L. Bailey, Esq., proctor for the libelant, filed an affidavit which appears at pages 8 to 10 of the Record. This affidavit asserts a number of immaterial facts, most of which could not possibly have been within Mr. Bailey's personal knowledge. Mr. Bailey's affidavit states in part:

> "The bills of lading were American contracts issued at American ports by the Strachan Shipping Company as agents and freight was prepaid at these American ports. As these bills of lading contained a clause providing for General Average, the right of the Charter Shipping Company to collect General Average should be determined, deponent verily believes, under the American Law by the American Admiralty Court.
>
> "The General Average act under which the Charter Shipping Company claims its right to a lien against the cargo in General Average was a strand in the American port of Jacksonville at the commencement of the voyage and some of the witnesses in regard to such strand are within American jurisdiction."

The affidavit then goes on to state a number of things which Mr. Bailey then believed that the petitioner would

contend and states that some of the witnesses with respect to these matters are located at Jacksonville and Newport News. Nowhere in the Record are there to be found the bills of lading or any special contract respecting general average. What the general average clause referred to in Mr. Bailey's affidavit provides, if anything, does not appear.

The only matters before Judge Thacher were the libel, the exceptions and Mr. Bailey's affidavit. No general average clause changing the ordinary rules of law was submitted to Judge Thacher.

Judge Thacher sustained the exceptions and endorsed on the motion papers the following note (R. 11):

> "From the authorities it appears that Contribution for General Average is to be determined by the law of the port of discharge. Under all the circumstances the Court should therefore decline jurisdiction, and the Exceptions to the libel will accordingly be sustained."

IV. *The Action of the Circuit Court of Appeals.*

The Circuit Court of Appeals reversed the decree below.

The Circuit Court of Appeals recognized that both parties to the litigation were British and that "*In the absence of some provision to the contrary in the bill of lading, the law or custom at the port of destination as to liability for general average prevails.*" The Court also recognized that it was discretionary for the Court to accept or decline jurisdiction, citing *The Belgenland,* 114 U. S. 355. The Circuit Court of Appeals' reason for reversing Judge Thacher is contained in the last paragraph of the opinion, which states:

> "The affidavits show that the witnesses as to the seaworthiness of the vessel are American witnesses.

> If the bill of lading, as is asserted, contained a Jason clause, the question of the exercise of due diligence to make the vessel seaworthy might be a relevant fact to determine the liability of the vessel for a general average contribution. This the trial judge did not refer to. He placed his decision on the ground that general average was to be determined by the law of the port of discharge. This we think an insufficient reason, in view of the proof as to convenience of witnesses for declining jurisdiction. It was expedient, under all the circumstances, to exercise it."

Two things are immediately apparent with respect to the opinion of the Circuit Court of Appeals:

1. It was not asserted before Judge Thacher that the bills of lading contained a "Jason" clause, nor will that statement or assertion be found anywhere in the Record before this Court or the Circuit Court of Appeals.

The only place that statement was made was in a reply brief filed by Mr. Bailey before the Circuit Court of Appeals. The Circuit Court of Appeals accepted a statement made by respondent's counsel which was not made to the District Judge and which is not in the record, and criticized the District Judge for not considering it. How he could have considered something not before him is difficult to understand.

The so-called "Jason" clause varies a good deal. *Congdon on General Average,* Second Edition, page 48, states that the "Jason" clause in use at the present time reads as follows:

> "If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and to have her properly manned, equipped and supplied,

it is hereby agreed that in case of danger, damage or disaster, resulting from accident, or faults or errors in navigation, or in the management of the vessel, or from any latent defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness."

If the above or a similar "Jason" clause was contained in the bills of lading, it is obvious that the parties did not contract to have their rights determined by American law and not by British law. The above clause touches only one small angle of general average and would be applied by the British Courts in conjunction with all other British law affecting rights and liabilities in general average. The clause does not and could not oust British law as the law applicable to fix the rights of the parties with regard to the numerous and complicated matters involved in a general average situation.

2. The statement that the affidavits show that the witnesses as to the seaworthiness of the vessel are American

witnesses is untrue in part. The officers of the steamer, the petitioner's principal witnesses, are all British. The *Charterhague* operates between Gulf ports and London, England (R. 2). Obviously, it is much more convenient for these witnesses to have the case tried in London. None of the witnesses on either side is located at New York. Furthermore, as the matter is governed by British law, petitioner will be obliged to examine a British barrister at considerable expense so that petitioner may establish in the United States District Court as a fact what the British law is respecting the matters in controversy between the parties. Moreover, the average adjusters who prepared the average statement in accordance with British law are in London and the deposits sought to be recovered are in London.

The reasons of the Circuit Court of Appeals for reversing show clearly that that Court substituted their own discretion for that of the District Court; that in so doing, they erroneously believed that all the witnesses as to the seaworthiness of the vessel were American witnesses. Furthermore, they condemned the District Judge for not referring to the possibility that the bills of lading contained a "Jason" clause of unknown and unstated terms, which possibility was neither asserted before the District Judge nor was contained in the Record before him or the Circuit Court of Appeals, nor is it in the Record before this Court.

V. *The Questions Involved.*

1. Where a District Judge (Thacher, J.) in the exercise of his discretion has declined to take jurisdiction in a suit in admiralty *in personam* between two British subjects, the subject matter of which is solely determinable by Brit-

ish law, may the Circuit Court of Appeals reverse the District Judge on the ground that the convenience of libelant's witnesses located at Norfolk and Savannah necessitated the trial of the case in the United States District Court for the Southern District of New York?

2. Where a District Judge has declined to take jurisdiction of a suit in admiralty between two foreigners with a common forum in a controversy solely determinable by the law of that forum, may the Circuit Court of Appeals reverse the District Judge and substitute its own discretion where the District Court has not erred in a matter of fact or wrongly applied a principle of law, or been guilty of an abuse of discretion?

3. May the Circuit Court of Appeals exercise the power of supervision over a matter resting upon the discretion of a District Judge where there has been no abuse of discretion but the Circuit Court of Appeals entertains a different view of how the discretion should have been exercised?

FIRST POINT.

THE RIGHT TO GENERAL AVERAGE DOES NOT ARISE OUT OF THE CONTRACT OF CARRIAGE AS SUCH.

Arnould on Marine Insurance, Vol. II, in the note to Sec. 908, says:

> "The view best supported by judicial authority in this country is that the right arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as the law of the ocean. *Cf. Burton* v. *English* (1883), 12 Q. B. D. 218; *Milburn* v. *Jamaica Fruit, &c., Co.*

(1900), 2 Q. B. at pp. 546 and 550. * * * It is, however, the view which has been generally adopted in America (The right to general average does not arise out of contract). *Cf. The Roanoke* (1893), 59 Fed. R. 161; *The Eliza Lines* (1896), 61 Fed. R. 308, 325."

In *Lowndes' General Average,* 6th Edition, Sec. III, at pages 27-32, there are set forth quotations of numerous English decisions, in which the courts held that the right to general average does not result from the contract of carriage, but exists wholly independently of it.

In *Milburn* v. *Jamaica Fruit &c. Co.* (1900), 2 Q. B. 540, Vaughan Williams, L. J., said at page 550:

> "The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England."

In *The Roanoke,* 59 Fed. 161 (C. C. A. 7th Circuit), Seaman, D. J., said at page 163:

> "The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered into the general maritime law. * * * This general average contribution is not dependent upon contract but is 'built upon the plainest principles of justice' (3 Kent Comm. 233), and is aside from contract (*The Eagle,* 8 Wall. 23): 'It is the safety of the property, and not of the voyage, which constitutes the true foundation of general average'. *Insurance Co.* v. *Ashby,* 13 Pet. 331. The vessel is made

to contribute, as well as the cargo saved, not because of its undertaking to carry, or out of any duty as carrier, but because it had encountered peril, and had been saved to the owners by a sacrifice of other property."

In the *Schr. Lewis H. Goward,* 1924 A. M. C. 1251 (S. D., N. Y.), Ward, Cir. J., said at page 1253 (not reported elsewhere):

> "But general average is entirely independent of the contract of carriage and arises as pure equity out of a sacrifice made or an expenditure incurred for the common benefit."

This principle was recognized as early as 1855 in the case of *Sturgis* v. *Cary,* 2 Curtis 383 (Fed. Case No. 13,573) in which case Curtis, J., said:

> "But this right to contribution does not arise from contract. It depends upon a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned."

See also:

The J. P. Donaldson, 167 U. S. 599 at 601;
Hobson v. *Lord,* 92 U. S. 397;
Barnard v. *Adams* (10 How. 270), 18 U. S. 393 at 397;
The Northern No. 30, 24 Fed. (2d) 975 at 976.

It will be seen, therefore, that it is a well established rule that the right to contribution in general average does not arise out of the contract of transportation, which in this case was the bill of lading, but exists entirely separate and distinct from it.

SECOND POINT.

GENERAL AVERAGE IS DETERMINED BY THE LAW OF THE PORT OF DESTINATION.

Authorities are unanimous to the effect that the law of the port of destination determines the rights and liabilities arising out of the general average, subject to any special contract which may be made modifying the port of destination rules with respect to some particular phase of the general average.

Coe on General Average, page 60;
Congdon on General Average, 2nd Ed., page 148;
Lowndes on General Average, 6th Ed., page 296;
Sturgis v. *Cary*, 2 Curtis 383;
Peters v. *Warren Ins. Co.*, Fed. Cas No. 11035;
Monsen v. *Amsinck*, 166 Fed. 817;
Hobson v. *Lord*, 92 U. S. 397, at 411;
Barnard v. *Adams* (10 How. 270), 18 U. S. 393, at 401;
Compagnie Francaise de Nav., etc. v. *Bonnasse*, 15 Fed. (2d) 202;
Minor v. *Commercial Union Assur. Co. Ltd.*, 58 Fed. 801;
National Board of Marine Underwriters v. *Melchers*, 45 Fed. 643;
Olivari v. *Thames & Mersey Marine Ins. Co.*, 37 Fed. 894;
International Navigation Co. v. *Sea Insur. Co.*, 129 Fed. 13 (C. C. A., 2nd Cir.).

Although the law of the port of destination governs the rights and liabilities arising out of a general average situ-

ation, the parties may contract to vary certain rules existing at the port of destination by incorporating the York Antwerp Rules of 1890 or of 1924 and by inserting one of the varying "Jason" clauses. *The Jason,* 225 U. S. 32.

The stipulation by contract of some particular condition to govern some phase of the general average which arises does not mean that the law of the port of destination does not control the rights and liabilities. It means simply that the law of the port of destination operates on the general average and passes on the rights and liabilities arising therefrom, in the light of the contract the parties have made if they have made any.

Even assuming, therefore, that the bills of lading in this case contained one of the varying "Jason" clauses, it still remains for the law of the port of destination (London) to determine the rights and liabilities arising from the general average, in the light of any special contract that the parties had made, with regard to any particular phase of the matter, and to apply its own general rules with respect to all the other matters in which the parties have not made a special contract. The so-called "Jason" clause covers only one small aspect of general average.

It is perfectly obvious that no court can properly pass upon this case without proof as a fact what the British law is with respect to all phases of this general average and the deposits made thereunder. This Court has had considerable experience in general average cases and is aware of their complicated nature. Proof with respect to the British law which governs the situation will be difficult and expensive, and the inconvenience of taking testimony in London either by an open or a closed commission would be very great.

THIRD POINT.

THE CIRCUIT COURT OF APPEALS DISREGARDED THE PRINCIPLES OF DISCRETIONARY JURISDICTION.

In admiralty cases between foreigners where a respondent has been brought within the jurisdiction of the Court, discretion is vested in the District Judge to take or decline jurisdiction. Long application of that discretion has resulted in certain settled principles. Diversity of nationality between the parties tends to invite assumption of jurisdiction; identity of nationality, the refusal. "The Court will not take cognizance of the case if justice would be done as well by remitting the parties to the home forum." *The Maggie Hammond,* 9 Wall. 435, at 457.

In *The Belgenland,* 114 U. S. 355, the Court said, at page 363:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals."

Undue hardship, convenience of witnesses, as distinguished from parties, whatever might commend itself to the discretion of the District Judge, are the tests commonly relied on to show the injustice of remission to the home forum. But considerations involving the interests of parties and witnesses must be balanced by considerations affecting the dominant convenience of the Court. The manner in which the District Judge must decide the case is a

consideration properly to be regarded by the Trial Judge. If the case is determined by the law of the forum, its decision presumably would be easy; if general maritime law controls, the source of decision is available; if the law of the parties' country controls, the Court must take proofs of that law and decide in accordance with the testimony. Obviously, it will be difficult for a District Judge, sitting in New York, to decide a complicated question of British general average by having the parties respectively examine British barristers on the subject. Why should our congested courts hear controversies between non-taxpayers who have a common forum and law?

Exclusive power should be vested in the District Judge to weigh all the considerations presented. No consideration should be conclusive.

The Record before the District Judge in this case presented a cause in admiralty between British subjects, the subject matter of which was solely determinable by the law of Great Britain. The law of Great Britain had to be proven as a fact, which proof could only be obtained at great inconvenience and expense. The convenience of the libelant's American witnesses was offered as a reason for assuming jurisdiction. None of them resides in New York. The convenience of the petitioner's British witnesses was offered as a reason for not assuming jurisdiction. These witnesses are frequently in London. There was no proof of the existence of any special contract respecting any aspect of the general average before the District Court. Even if there was such proof and that proof had gone to the extent of showing a special contract that the general average should be entirely governed by American law, the matter of jurisdiction still rested within the discretion of the Dis-

trict Judge. But there was no such contract and no such question before the District Judge.

The Circuit Court of Appeals have attempted to exercise a supervisory power which they do not possess. They have gone the length of criticizing a District Judge for not going outside the Record and considering an immaterial matter of which he could have no knowledge. In so doing they have established a rule which will add a number of foreign cases to an already congested docket.

Even if the Circuit Court of Appeals had any discretion, their action would be an abuse of it, for that Court took into consideration and based their decision upon the existence of a fact not in the Record, to-wit: the "Jason" clause. In effect they passed on a non-existent case which had never been before the District Judge.

The opinion of the Circuit Court of Appeals places in the reports an extreme limitation on, if not a total denial of, the discretionary power of District Judges to decline jurisdiction in admiralty suits between aliens and sets up in a Circuit Court of Appeals the authority to make arbitrary reversals of discretionary decisions.

The decision of the Circuit Court of Appeals is bound to invite alien litigants to avail themselves of the American admiralty courts whenever some particular litigant thinks that the American law or procedure would be more favorable to his case then the law of his home forum.

All the considerations which should determine whether jurisdiction should be taken or declined are properly matters within the discretion of the District Judge. If he exercises that discretion in good faith, in line with established legal principles, and upon the basis of the Record before him, his discretion should not be disturbed.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED WITH COSTS.

Respectfully submitted,

CLETUS KEATING,
Counsel.

New York, January, 1930.